87-1219

No.

Supreme Court, U.S.
FILED
JAN 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1987

G. & T. TERMINAL PACKAGING CO., INC., and ANTHONY SPINALE,

Petitioners,

-vs-

CONSOLIDATED RAIL CORPORATION,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit. (Third Circuit No.86-5897)

PETITION FOR WRIT OF CERTIORARI

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35 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

1. Does Federal law preempt common law claims against rail carriers for discriminatory conduct practiced during the period in which the Interstate Commerce Commission, pursuant to the Staggers Rail Act of 1980 (Pub. L. No. 96-448, 94 Stat. 1898), has exempted relevant rail traffic from regulation thereby freeing carriers of traditional common carrier obligations that otherwise prohibit such dscriminatory behavior?

2. Does a rail carrier violate the Interstate Commerce Act, 49 U.S.C. Sec. 10505(e) and 11707(a), which grant shippers the right to file claims for recovery of damages caused by the carrier, if it imposes a discriminatory charge on a shipper in order to nullify such a claim right?

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G. & T. Terminal Packaging Co., Inc. and Anthony Spinale Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (App.A) are reported in 830 F.2d 1230. The District Court opinion (App.D) is reported at 646 F.Supp. 511. Two related opinions of the District Court of September 24, 1984 (App.E) and April 8, 1985 (App.F) are not reported. Interstate Commerce Commission decision #40045, of February 27, 1986 (App.G) is reported in 1 ICC2d. 895.

JURISDICTION

The judgment of the Court of Appeals (App.B) was entered on September 23, 1987. A petition for rehearing was denied October 22, 1987 (App.C). Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The following sections of the Interstate Commerce Act (ICA) Title 49 of the United States Code, are the relevant statutory provisions involved in this case:

> "1. §10101a.
> In regulating the railroad industry, it is the policy of the United States Government--
>
> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
>
> (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;
>
> * * *
>
> (13) to prohibit pedatory pricing and practices, to avoid undue concentrations of market and power and to prohibit unlawful discrimination;
>
> 2. §10103.
> Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law.

3. 10501.
(d) The jurisdiction of the Commission and of State authorities (to the extent such authorities are authorized to administer the standards and procedures of this title pursuant to this section and section 11505(b) of this title over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive.

4. §10505.
(e) No exemption order issued pursuant to this section shall operate to relive any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

5. §10741
(a) A common carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of Chapter 105 of

this title may not charge or receive from a person a different compensation (by using a special rate, rebate, drawback, or another means) for a service rendered, or to be rendered, in transportation the carrier may perform under this subtitle than it charges or receives from another person for performing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances. A common carrier that charges or receives such a different compensation for that service unreasonably discriminates.

6. §11707.

(a)(1) A common carrier providing transportation or services subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II, or IV of chapter 105 of this title and a freight forwarder shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier or freight forwarder and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission under subchapter I, II, or IV are liable to the person entitled to recover under the receipt or bill of lading.

> The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering ;carrier, or (3) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and, except in the case of a freight forwarder, applies to property reconsigned or diverted under a tariff filed under subchapter IV of chapter 107 of this title. Failure to issue a receipt or bill of lading does not affect the liability of a carrier or freight forwarder. A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

STATEMENT OF THE CASE

Petitioner G.&T. Terminal Packaging Co., Inc. ("G.&T.") purchases for resale potatoes grown in Idaho and other western states. G.&T.'s facilities are located at the Hunts Point market in the Bronx (New York City) New

York. G.&T. also maintains a repackaging facility at a separate location in Kingsbridge, Bronx, New York about six miles from Hunts Point. Consolidated Rail Corporation (Conrail) is the only railroad that can provide rail service to G.&T.

In 1980, Congress adopted the Staggers Rail Act, Pub. Law No. 96-448, 94 stat. 1898. Pursuant to Staggers Act authorization, the Interstate Commerce Commission ("ICC") exempted rail transportation of potatoes from agency regulations. 367 I.C.C. 298 (1983). The exemption of potatoes from ICC regulation permitted rail carriers fix unilaterally the freight charges that shippers and receivers had to pay without regulatory review or approval. Rail carriers were given a free hand to charge whatever they chose.

In May 1983, without prior notice or explanation, Conrail created a special freight surcharge payable only by G.&T. and two other companies owned or serviced by

petitioner Spinale at his Kingsbridge and Hunts Point, Bronx, New York locations. (Mr. Sprout, Inc. and Tray Wrap, Inc.) This discriminatory surcharge was not based upon differences in delivery or transportation costs. It was in relation for petitioners' filing damage claims as permitted by 49 USC 11707.

Conrail required connecting western rail carriers to add to the applicable freight charge to all shipments to petitioners an additional charge of $500.00 to $600.00 regardless of the destination point on the Conrail system.

When petitioners protested to Conrail, they were told the discriminatory freight surcharge would be substantially eliminated if petitioners would agree not to file any more damage claims.

Petitioners refused to surrender their Federal guaranteed right to file claims for losses incurred as a result of misconduct of

Conrail or other rail carriers. The practical effect of the freight surcharge and its design and intent has been to essentially nullify Petitioner's ICA claims right by offsetting the value of the claims by the amount of the discriminatory freight surcharge. In 1983, for example, G. & T. received more than 400 freight car loads of Idaho and western potatoes. The discriminatory freight surcharge if applied to shipments for that year alone at a rate of $500.00 per car would have exceeded $200,000.00. (Since the surcharge was not in effect during all of 1983, the above is by way of example only).

Petitioners wrote the chairman of the ICC asking whether that agency continued to exercise jurisdiction over such conduct. The agency was asked to determine whether it had "any remaining jurisdiction with regard to disputes of this nature."

Heber P. Hardy, Director of the Office of Proceedings, who replied for the Chairman, responded that the ICC no longer exercised jurisdiction over such rates, and that any dispute "with Conrail, or other railroads would have to be settled in the courts rather than before the Commission."

This action then was brought by petitioners before the U.S. District Court. Jurisdiction, inter alia, was based upon 28 U.S.C. Section 1331 and 28 U.S.C. 1332.

Petitioners and Conrail filed motions for summary judgment. On September 24, 1984, Judge Harold Ackerman denied petitioners' motion. The court granted Conrail's motion for summary judgment with regard to plaintiffs' claims for relief under 49 U.S.C. Section 10741 and 11707. (App. E)

Judge Ackerman also held that plaintiffs' rights under the common law were not preempted by the Staggers Act amendments

to the ICA and denied Conrail's motion as to petitioners' claims under the common law.

Conrail filed a motion for reargument. On April 8, 1985, Judge Ackerman again denied Conrail's motion. (App.F).

During discovery petitioners obtained information about Conrail's actions leading to the imposition of this special surcharge. Following completion of discovery and a week after the final pretrial of the case, Conrail, without notice to petitioners or the court, on September 27, 1985 filed a petition with the ICC requesting the commencement of a declaratory order proceeding. Conrail sought a declaratory order that all common law remedies with respect to railroad rates and conditions of service were preempted by the ICA.

On March 5, 1986, the ICC issued an interpretative decision. The agency asserted, despite its earlier statement to petitioners, that it retained jurisdiction

over matters exempted under Section 10505 expressing its view that there were no surviving common law causes of action. The ICC denied Conrail's request for the institution of a declaratory proceeding holding that such a proceeding was "unwarranted at this point". (App.G)

On April 25, 1986, Conrail again filed for summary judgment. Petitioners filed a cross-motion to restore its claim for relief pursuant to Section 49 U.S.C. 10741 and 11707.

Shortly before the scheduled hearing, the case was reassigned from Judge Ackerman to the Honorable Alfred J. Lechner, Jr. Petitoners asked for reconsideration noting the pending motions dealt with matters previously ruled upon by Judge Ackerman and requesting Judge Ackerman be permitted to act on the pending motions. This request was denied by the Chief Judge.

Judge Lechner on October 23, 1986, granted Conrail's motion to dismiss G.&T.'s common law claim of rate discrimination and also denied G. & T's motion to restore its claim for relief under the ICA. (App. D).

In a two to one decision, the Court of Appeals upheld the District Court. The panel majority held that the "shippers (e.g. G. & T.) remedy for price discrimination is simple: it can choose to use other means of transportation." (App. A, 13a) This factual conclusion was contrary to the record before the court.

To consumers, there is a great difference between western and eastern potatoes. Eastern potatoes cannot be substituted for Idahoes or other westerns potatoes. The record before the Court of Appeals was clear that most western potatoes are grown in Idaho and that virtually all western potatoes are delivered by rail to all eastern receivers including G. & T. A 1983

U.S.D.A. survey showed that 98% of all Idaho potatoes were delivered to New York by rail. Cost factors rule out alternative modes of transportation.

Any assumption of the panel majority that local or truck delivery potatoes could be substituted for Idahoes was factually incorrect and reflected a lack of understanding of G. & T.'s business. The loss of rail service would mean the loss of G.&T.'s market for Idaho and western potatoes.

The Court of Appeals also failed to accept for purposes of reviewing the grant of Conrail's motion of summary judgment, petitioner's contention that Conrail singled out G.&T. for the imposition of a discriminatory freight surcharge because it had exercised its legal right to file claims for damages.

Conrail did argue its actions were based on legitimate business considerations.

Petitioners, however, disputed such self-serving statements and documented much more nefarious reasons for Conrail's punitive actions against them.

During discovery, it was learned that John Kurt, a Conrail employee, prepared a Conrail report to provide a cost justification for the surcharge. He had been instructed to "solve the problem, get rid of him" meaning Mr. Spinale. The Kurt report also revealed its purpose was to "explore opportunity to embargo traffic to G. & T. Terminal Packaging Co.". Conrail also offered to substantially eliminate the surcharge if G. & T. gave up its right to file claims.

Petitioners' contention, therefore, that Conrail maliciously imposed a discriminatory surcharge to punish G. & T. and to deprive it of its right to seek compensation for damages was an intrical part of the warp and woof of the record before the District Court. The

legality of the surcharge, could not properly be based on a factual conclusion that Conrail had a defensible business reason for its actions. This, however, was the thrust of the panel's decision to uphold Conrail's discriminatory freight surcharge.

The panel majority has sanctified discriminatory freight surcharges against shippers and receivers largely on the view that Texas Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 416 (1907) is controlling. Only this Court can determine whether such an interpretation is correct.

REASONS FOR GRANTING THE WRIT

In a chain of decisions during this century this Court has recognized the special status of common carriers and their obligations to customers under both regulation and the common law. Western Union Telegraph Co. v. Call Publishing Co., 181 U.S. 92 (1901); Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., supra; Nader v.

Allegheny Airlines, Inc., 426 U.S. 290 (1976); Transcontinental Gas Pipe Line Cop. v. State Oil & Gas Bd., _____ U.S. _____ (54 U.S.L.W. 4114 (Jan. 22, 1986).

To petitioner's knowledge, this court has never found that Federal deregulation of a common carrier such as a railroad has freed such carriers not only from Federal and State regulations but also from common law obligations thereby permitting carriers to impose clearly discriminatory charges.

The implications of such a conclusion are enormous. It means that railroads are no longer common carriers but conventional business enterprises although they are not subject to regulatory laws such as the Federal Trade Laws generally applicable to non-carriers that prohibit discriminatory actions.

Since the railroad was invented more than 150 years ago, their special status as a

common carrier with exclusive franchises carries with it an obligation of fairness. This court repudiated early carrier arguments that would have placed persons dealing with common carriers engaged in interstate commerce absolutely at the mercy of the carriers.

In Western Union Telegraph Co. v. Call Publishing Co., supra at 181 U.S. 99, this court observed:

> "Common carriers, whether engaged in interstate commerce or in that wholly within the state, are performing a public service. They are endowed by the state with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights both in respect to service and charges....that principle of equality does forbid any difference in charge which is not based upon a difference in service and, even when based upon difference of service must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination. To affirm that a condition of things exists under which common carriers anywhere in

> the country, engaged in any form of transportation, are relieved from the burdens of these obligations, is a proposition which, to say the least, is startling. And yet, as we have seen, that is precisely the contention of the telegraph company. It contends that there is no federal common law, and that such has been the ruling of this court; there was no federal statute law at the time applicable to this case, and, as the matter is interstate commerce, wholly removed from state jurisdiction, the conclusion is reached that there is no controlling law, and the question of rights is left entirely to the judgment or whim of the telegraph company." (Emphasis Added)

The opinion goes on to reject such a contention of the carriers as follows:

> "Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in statutes of Congress? We are clearly of the opinion that this cannot be so, and that the principles of the commons law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactment." 181 U.S. at 102.

The panel majority in an effort to respond to Judge Aldisert's strong argument against taking the quantum leap to the conclusion that Congress closed the door to all judicial remedies when deregulation set in (App.A), was reluctant to recognize that their holding would leave shippers and receivers without a remedy for price discrimination. It cavalierly insisted petitioners had a remedy saying the "shipper's remedy for price discrimination is simple: it can choose to use other means of transportation". (App.A.)

Obviously, such a "remedy" is no remedy at all. The "right" to stop using rail services hardly is a remedy for unjust carrier discrimination.

This case poses a critically important, as well as a novel issue: Does the Staggers Rail Act of 1980, properly interpreted, intentionally preempt state or federal common law claims against rail carriers for

discriminatory conduct engaged in by these carriers during the period in which the ICC has exempted the relevant rail traffic from regulation? If the common law rights of shippers and receivers against common carriers are unavailable during the time that the ICC has suspended regulatory control of alleged discriminatory conduct of rail carriers, the special obligations of common carriers as evolved through the common law are destroyed, although no compensating protection is available under any system of agency regulation. Freight charges would be left entirely to the judgment or whim of the rail carrier even if obviously unfair or discriminatory.

This court has previously resisted such a result, saying:

> "We should be very loth to hold that in the absence of congressional action there are no restrictions on the power of interstate carriers to charge for their services; and, if there be no law to restrain, the necessary result is that there is no limit to

> the charges they make make and enforce." Western Union Telegraph Co. v. Call Publishing, supra at 95.

The Court of Appeals finds it perfectly permissible to leave all shippers and receivers at the mercy of the carriers. It does so largely based on the conclusion Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., supra., requires such a result.

In Abilene, the issue was whether the ICA also permitted courts to grant relief to a shipper upon a finding that a freight rate charged for an interstate shipment was unreasonable even if the rate had been fixed by the duly published and filed rate sheet and when the rate had not been found to be unreasonable by the ICC. In considering this issue, this court noted that: "It may not be doubted that, at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in

damages." 204 U.S. at 436. The opinion also notes:

> "That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preferences is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principle purposes of the act." 204 U.S. at 339.

In Abilene, the issue was not whether carriers should be free to engage in "unjust discrimination" but whether regulatory and judicial remedies co-existed and this Court held that Congress did not intend to preserve two possibly inconsistent remedies for unjust discrimination.

In the name of Abilene, but not in its spirit, the Court of Appeals holds that Congress intended rail carrier customers to have neither a regulatory nor a judicial remedy for unjust discrimination. We ask this Court to decide whether Congress in the Staggers Act and this court in Abilene sanctioned such a result.

The Court of Appeals failed to recognize there is no regulatory scheme since deregulation by the ICC. The discriminatory freight surcharge in this case was not fixed pursuant to a regulatory process but was imposed at the whim of the carrier. The deregulatory action taken by the ICC which remains in effect today precludes any review before the ICC to protest the illegality or inequity of the carrier's actions.

Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976), re-examined the meaning and intent of Abilene with regard to the existence of common law remedies in the case of tortious behavior by air common carriers. In Nader, the carrier raised a similar argument that such remedies were inconsistent with the jurisdiction of the Civil Aeronautics Board (CAB). The Federal Aviation Act of 1958, contains language similar to that set forth in 49 U.S.C. 10103. That Court of Appeals also relied on Texas &

Pac. Ry. Co. v. Abilene Cotton Oil Co., supra, and held that the CAB's cease and desist power eliminated private remedies for common law torts arising from unfair or deceptive practices by regulated carriers. It stayed judicial consideration until the CAB completed ongoing rulemaking proceedings. This court came to the contrary conclusion:

> "In this case, unlike Abilene, we are not not faced with an irreconcilable conflict between the statutory scheme and the persistence of common-law remedies. In Abilene the carrier, if subject to both agency and court sanctions, would be put in an untenable position when agency and court disagreed on the reasonableness of the rate. The carrier could not abide by the rate filed with the Commission, as required by statute, and also comply with the court's determination that the rate was excessive. The conflict between the court's common-law authority and the agency's right-making power was direct and unambiguous. The court in the present case, in contrast, is not called upon to substitute its judgment for the agency's on the reasonableness of a rate - or, indeed, on the reasonableness of any carrier practice." 426 U.S. 299.

Judge Aldisert's dissenting opinion points out that in this case there is:

> "...no irreconcilable conflict between a common law remedy here and the ICC's jurisdiction as provided by Congress. Because the common law action is available only when the ICC surrenders its jurisdiction over the relevant traffic by granting an exemption, the court's will not substitute their judgment for that of the agency's on the reasonableness of any carrier practice. As contemplated by the savings clause of the Staggers Act, 49 U.S.C. Section 10103, a common law remedy may co-exist with the role of the ICC in regulating rail transportation." (App.A)

In Nader, no conflict was found to exist even though the CAB was considering proposals to regulate the conduct upon which Mr. Nader based his common law action. Here the Court of Appeals found a conflict because the ICC has determined there is no need to regulate the carrier. The panel majority concluded that judicial review of tortious behavior would consitute "case-by-case judicial regulation of rates". (App.A)

The panel majority opinion obscures the critical distinction between "regulation" and judicial review of tortious behavior. The essence of regulation is prior restraint with a system for filing and approving tariffs and enforcement initially through an administrative body. A tort remedy, such as is provided at common law, is an after the fact examination of a carrier's conduct to make certain that fundamental concepts of fairness and justice have not been violated. It is not before the fact regulation.

The Court of Appeals' decision runs squarely counter the reasoning in Western Union Telegraph Co. v. Call Publishing, supra; Texas & Pac. Ry. Co. v. Abilene Cotton Oil Col, supra, and Nader v. Allegheny Airlines, supra. Its decision drastically affects all shippers and receivers. On an issue of such paramount importance, the resolution of this heretofore unresolved

issue by this Court is a matter of urgency and necessity.

The Court of Appeals also rejected Petitioners' contention that Conrail's use of a punitive surcharge deprived G.&T. of its legal right to pursue claims under the Federal ICA. G.&T. argues that Conrail intended to strip it of its right to file claims by misuse of its freight charging power and that such action was contrary, not only to common law, but as to Federal statutory law.

The potential for rail carrier abuse is extremely high if Conrail legally can eviscerate the value of shippers' and receivers' claims rights by simply imposing excessive and unjustifiable "surcharges". Even if a shipper or receiver retains the technical "right" to seek claims payment, it has little meaning should carrier have an unreviewable power to neutralize the value of

claim payments through the use of manipulative rates. Such an indirect action to achieve an illegal goal is barred by law. Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955). This issue also warrants the attention of this court.

That these issues are novel, difficult and far from final resolution. On the District Court level Judge Ackerman and Judge Lechner came to diametrically opposite conclusions and the panel of the Court of Appeals divided two to one on the self-same issues.

These differences are well summarized by Judge Aldisert:

> "What divides this court is a straightforward disagreement. We are not fencing with glancing blows. Our divergent views meet a single controlling issue head on: Does federal law preempt state common law claims against rail carriers for discriminatory conduct practiced during the period in which the Interestate Commerce Commission, pursuant to the Staggers Rail Act of 1980, has exempted relevant rail traffic from regulation? The majority says

> common law remedies are preempted in these circumstances. I say they are not. (App.A)

At some point, this Court will resolve finally whether Congress intended to unleash the railroads to such an extent they may engage in unrestrained discriminatory behavior. This issue is posed starkly in this case by Conrail's actions and it is ripe for decision.

CONCLUSION

On the issue of discrimination, Professor Louis B. Schwartz observed:

> "...discrimination between customers violates some deeply held principles of fairness or equity. Much of the opposition to anti-discrimination legislation found among economists stems from an indifference to the "non-economic" and "non-quantifiable" considerations of "justice". Antitrust and Regulatory Alternatives, Schwartz and Flynn, 5th Edition (Foundation Press, N.Y. 1977), p. 868.

We entreat this Court not to be indifferent to the "non-quantifiable" considerations of justice and to decide whether the price the public must pay to

correct over regulation by the ICC is unconscionable carrier behavior that runs counter to "deeply held principles of fairness or equity".

Respectfully Submitted,
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